IN THE FAMILY COURT OF NOVA SCOTIA
Citation: K.C. v. J.L., 2010 NSFC 29

Date: 20101115
Docket: 10Y070134 & 08Y061231
Registry: Yarmouth

Between:

K.C.

Applicant/Respondent

v.

J.L.

Respondent/Applicant

AND IN THE MATTER OF THE APPLICANT
D.T.
for leave to apply for custody/access

Applicant

and
J.L. and K.C.

Respondent

Judge:	The Honourable Judge John D. Comeau, Judge of the Family Court of Nova Scotia
Heard:	October 20, 2010, in Yarmouth, Nova Scotia
Written Decision:	November 15, 2010
Counsel:	Timothy D. Landry, Esq. for the Applicant K.H.C. Ceila Melanson, Esq, for the Respondent, J.B.L. Lynn Connors, Esq. for the Applicant, D.T.

DECISION

THE APPLICATION:

[1] The process before the court contains two files and for convenience both will be addressed in this decision.

[2] K.C. and J.L. are the biological parents of the child Lucas born September 25, 2007.

[3] The mother K.C. has applied for custody of Lucas and "for permission to move with him to Yorkton, Saskatchewan. J.L. the father applies to vary a consent order of this court dated November 4, 2008 which required him to pay $140.00 a month child support based on an annual income of $16,231.00. He is requesting the following relief:

> "I therefore request joint custody of the child, Lucas, with J.L. being the primary caregiver and reasonable access to K.C.; and an order that neither party can remove the child from the Court's jurisdiction without the other party's consent."

[4] The issues of custody, access and mobility were not addressed in the consent order of November 4, 2008. Consequently this is not an application to vary and

proof of change in circumstances is not required. Section 18 is applicable and the parents retain the status of joint custodians.

[5] The Court made an order dated June 9, 2010 that the child Lucas "will not be removed form the jurisdiction of Nova Scotia except for vacations as agreed to by the parties."

[6] D.T. is the paternal grandmother of Lucas and she is asking the Court for the following relief:

> "Leave of the Court to apply for custody of the child, Lucas, born September 25, 2007 with access to J.L. and K.C. If leave granted, an application for custody and access for the child Lucas."

ISSUE: Mobility with the child and custody/access

FACTS:

[7] Prior to evidence being called in this matter the court determined there was sufficient connection and bonding in the best interests of the child to grant leave to the paternal grandmother.

[8] Custody is not contested in this case because the Respondent - mother has advised if the issue of mobility is not granted the status quo shall remain. That is to say if the Applicant - mother is not allowed to move to Saskatchewan with the child she will continue to parent in Yarmouth County. She is presently residing with her mother and evidence is this could continue on a long term basis.

[9] The Applicant - mother advises of her course completion (general office training) at Nova Scotia Community College and she plans to move with the child to Yorkton, Saskatchewan to be with her father. She indicates the job potential there is better than in Nova Scotia and particularly the Yarmouth area. This would result in a better life for her and the child Lucas.

[10] Lucas is three years old and the Respondent J.L. is his father. His paternal grandmother is D.T. Both oppose the child's move to Saskatchewan with his mother saying it would be contrary to his best interests.

[11] The Applicant has planned the move by securing child care in Yorkton. She calls the move temporary for a year or two and indicates she has a number of

relatives there which include her natural father, two siblings and a number of other relatives which Lucas has been exposed to on previous visits. She recently visited there on a three week vacation. During this time, and if and when the anticipated move takes place, she will attempt to maintain contact with the Respondent J.L. and the Applicant D.T. by way of computer and telephone calls.

[12] The Applicant is prepared to make arrangements for child access. In fact she suggested that the child be with one parent or another on a three month basis. (Given the age of the child this may be contrary to his best interests.)

[13] Evidence was submitted to the court indicating both parents are exceptional when it comes to caring for the child and providing for his needs.

[14] The maternal grandmother believes that a move to Saskatchewan is a positive one but would miss her grandchild.

[15] The Respondent - father has exercised his regular access to Lucas and he does many activities with him within a very close relationship and for this reason be he opposes the move.

[16] The paternal grandmother D.T. and her husband have a very special and close bond to the child. She was always there since birth to assist the parents with him. While the Applicant - mother was in school at the NSCC she provided the care for Lucas. The evidence discloses, this relationship is exceptional when it comes to grandparent child relationships and bonding.

[17] The evidence is that the Applicant - mother has not attempted to find employment in the local area.

[18] As referred to earlier the parents retain the status of joint custody, however, there is a dispute that the Applicant - mother has been the primary caregiver. This may be relevant when the court analyses and applies the law. The Respondent - father indicates that the status quo is a shared parenting situation. He points out that following their separation the parties agreed verbally to a parenting schedule with the child in his care Thursday evening to Sunday evening. When the mother attended school in September 2009 the parties verbally agreed to change the schedule so the child was in each parent’s care on alternating weekends. This is where the paternal grandmother played a major role taking care of Lucas on

weekdays while he spent the nights with his mother. The child has spent some overnights with his grandmother. Since court proceedings the Applicant - mother has not been forthcoming with access that was established previously.

THE LAW:

The **Maintenance and Custody Act** provides an avenue for parents and grandparents to apply for custody and access:

> "Powers of court
>
> 18(1) In this Section and Section 19, "parent" includes the father of a child of unmarried parents unless the child has been adopted.
>
> (2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order
>
> (a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or
>
> (b) respecting access and visiting privileges of a parent or guardian or authorized person.
>
> (4) Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise

> (b) ordered by a court of competent jurisdiction.
>
> (5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration."

[19] Conditions to custody are not provided for in the statute. The decision of *Blois v. Blois* (1988) 83 N.S.R. (2d) 328(N.S.C.A. Jones J.A.) holds s. 18 (5) obliging the court to give paramountcy to the welfare (best interests) of the child gives the Family Court under the **Family Maintenance Act** (now the **Maintenance and Custody Act**) the authority to place conditions on custody orders.

[20] This is primarily a mobility issue which, if denied the child custody could be reviewed.

[21] The decision in *Gordon v. Goertz* [1996] 2 S.C.R. 27 was an application to vary an existing custody order although that is not the case here. In that decision the Supreme Court of Canada set out a number of factors to consider in mobility

cases at paragraph 49. The relevant ones in the case before the court are as follows:

> "4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parents's views are entitled to great respect.
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> 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
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> 6. The focus is on the best interests of the child, not the interests and rights of the parents.
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> 7. More particularly the judge should consider, *inter alia:*
>
> (a) the existing custody arrangement and relationship between the child and the custodial parent;
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> (b) the existing access arrangement and the relationship between the child and the access parent;
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> (c) the desirability of maximizing contact between the child and both parents;
>
> (d) the views of the child;
>
> (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to the parent's ability to meed the needs of the child;
>
> (f) disruption to the child of a change in custody;

> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
>
> In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed againt the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?"

[22] The decision in *BURNS v. BURNS* [2000] N.S.R. (2d) TBED. JA 036 deals with consideration of the custodial parent's views: A decision denying a move was overturned where the court failed to consider this and overemphasized the detriment of the proposed move.

[23] It is argued in the case before the Court that the Applicant is not the custodial parent. *GORDON v. GOERTZ* supra. referred to the custodial parent in paragraph 48:

> "While a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability."

CONCLUSIONS/DECISION:

[24] The ultimate decision is what is in the best interests of the child not what is in the interest of the parents. Sometimes these considerations coincide but other times they do not.

[25] A review of the Applicant - mother's plan gives the court some concern that she has not looked at the long term affects such a move would have on the child. At one moment it appears to be a long term planned move and the next it appears is only be for a couple of years. In her haste to leave Nova Scotia she has proposed an access regime of three months with the Respondent - father alternating three months with her. For a three year old child this would be very disruptive and contrary to his best interests. This is due to an absence of physical contact from either parent for that length of time. Having made up her mind to leave she has not looked for work in the local area and, in fact, she has not yet secured a job in Saskatchewan. She wants to shift the contact with one set of relatives for another and destroy a strong bond that exists between the child and his father and paternal grandmother all for the purpose of a potential job prospect that she thinks is better there than here (again having not investigated any job prospects here).

[26] The paternal grandmother has provided a lot of support to two parents who are still learning the enormous responsibility it is to parent a child. Their need to have the support of the paternal grandmother is reflected in their actions.

[27] The father has had two impaired driving charges, the latest being in the Spring to be dealt with by the Court in the next two weeks. The mother has been corresponding with an old school friend who is in prison for attempted murder among other things. She has testified this is no longer going on.

[28] In addition to providing child care the paternal grandmother has cleaned the parent's home and gave them whatever support that was needed. She is an exceptional grandparent with a special bond with Lucas.

[29] The maternal grandmother who lives in the area has had the Applicant - mother living with her and there is no time line on this residency.

[30] A review of the evidence and the application of the factors set out in *GORDON v. GORTZ* makes it difficult for the Court to find that the proposed

move is in the best interests of the child. The move would destroy the bond between him and his father and the paternal grandmother. What would be substituted is a group of relatives who do not have the same type of bond with him. His maternal grandmother is also here and he has a bond with her.

[31] The past parenting history does not support the suggestion that the Applicant - mother is the custodial parent so-called. Even if she was the court finds her proposal to be unrealistic, not well planned and contrary to the child's best interest.

[32] The custody of Lucas will remain as set out in Section 18 (4) of the **Maintenance and Custody Act**. The parents are joint custodians and neither shall remove the child's residence from the jurisdiction of the court, more particularly the Yarmouth County area without the permission of the other or the court. Vacations with the child no longer than three weeks will be the exception to this condition.

[33] Until the child goes to school joint custody contemplates a shared parenting situation such as existed in the past. The Respondent - father shall have parenting time Thursday evening to Sunday evening and the rest of the time with his mother.

[34] It is very difficult to divide a child's time between separated parents and a third party grandparent. The court has granted the paternal grandmother leave to apply for custody access and because of her close bond with Lucas she should have access. Ideally and most common a grandparent can exercise access through their child. It is hoped the Respondent J.L would share his parenting time with his mother. She would also have such other reasonable access as can be agreed between the parties. When either parents requires child care that service would be provided by the Applicant grandmother as part of her access.

[35] Counsel for the Respondent - father shall prepare the order in collaboration with counsel for the Applicant grandmother.

[36] In keeping with the best interests of the child the court is not adverse to the so called tweeking of this order by agreement of all the parties taking into

consideration the intent that the three parties shall, as time allows, somehow get to maximize their time with the child.

Ordered Accordingly,

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John D. Comeau
Jude of the Family Court